

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SAMUALLA L. PRY,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF1221930025M1

DATE: NOV 10 1993

Daniel D. McLeod, Esquire, Seaside, California, for the
appellant.

Marcia Beaumont, Monterey, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board after the Court of Appeals for the Federal Circuit granted the Board's motion to remand the case for reopening, further consideration, and decision by the Board. For the reasons discussed below, we REVERSE the initial decision dismissing the appellant's Individual Right of Action (IRA) appeal as untimely filed, and we REMAND the appeal to the San Francisco Regional Office for adjudication.

BACKGROUND

Effective November 7, 1990, the agency terminated the appellant from her position of Police Officer, GS-05, based on the expiration of her temporary appointment. Initial Appeal File (IAF), Tab 1. On August 6, 1992, the Office of Special Counsel notified both the appellant and the agency that it had completed an investigation of her whistleblowing allegations and found insufficient evidence that the appellant was the victim of reprisal in violation of 5 U.S.C. § 2302(b)(8); specifically, the appellant had contended that she had received a Letter of Caution, that her temporary appointment was not renewed, and that she was not converted to permanent status because of her protected disclosures. IAF, Tabs 1 and 5, Subtab 4T.

On October 12, 1992, the appellant filed an IRA appeal with the Board's San Francisco Regional Office. Initial Appeal File (IAF), Tab 1. In his acknowledgment order, the administrative judge notified the appellant that her appeal did not appear to meet the timeliness requirement that it have been filed no later than 65 days after the issuance of the Special Counsel's written notification that it was terminating its investigation concerning her allegations. The administrative judge ordered the appellant to file evidence and argument showing that her appeal was filed timely or that good cause existed for the delay. IAF, Tab 2.

In response, the appellant stated that she and the agency had been engaged in unsuccessful settlement negotiations on

Friday, October 9, 1992; the 65-day filing period expired on Saturday, October 10, 1992; and, she filed her appeal on Monday, October 12, 1992, Columbus Day. She noted that this was the Columbus Day Federal holiday, and she contended that her filing was timely in accordance with well-established rules of Federal and state procedure which extend a deadline falling on a weekend or Federal holiday to the next business day, or in this case to October 13, 1992. IAF, Tab 4. The agency's response contested the merits of the appeal. IAF, Tab 6.

In his initial decision, the administrative judge dismissed the appeal as untimely filed. IAF, Tab 7. The administrative judge noted that the appellant knew that the 65th day after the date of the termination letter from the Office of Special Counsel (OSC) fell on October 10, 1992, a Saturday of a three-day weekend. Initial Decision (ID) at 2. The administrative judge found that the Board had held in *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 592 (1992), that it lacks the authority to waive the statutory time limit¹ for filing IRA appeals. The administrative judge found that the appellant was correctly notified by OSC of the proper time

¹ I.e., under 5 U.S.C. § 1214(a)(3), an IRA appeal is timely if filed within 60 days since "notification was provided" by OSC. In *Wood*, as further noted by the administrative judge, the Board found that, even though this language might be ambiguous, the Board's construction of it in the implementing regulation is very clear. *Wood*, 54 M.S.P.R. at 591. The implementing regulation increased the filing time to 65 days to allow for mailing time. *Id.* at n.7.

limit for filing her IRA appeal to the Board but filed it two days past the 65-day filing deadline. ID at 3.

The appellant did not file a petition for review with the Board. After the initial decision became final, she exercised her right to appeal to the Court of Appeals for the Federal Circuit. Litigation File (LF), Tab 1. The appellant argued that the California Rules of Procedure, as well as the Federal Rules, provide that when a business is closed for the weekend or legal holiday, then the filing time should be the next business day. She further contended that applying the regulation without regard to the last day's falling on a weekend, in effect, allowed her less than 65 days in which to respond. LF, Tab 5. In response to the Board's motion, the Court remanded the case for its further consideration of the issue of whether a statutory time limit for an IRA appeal may be extended when the final day for filing falls on a weekend or legal holiday. LF, Tabs 13, 14.

ANALYSIS

As we have noted above, the administrative judge, citing *Wood*, 54 M.S.P.R. at 587, found that the time limits for IRA appeals were statutorily imposed and could not be waived and that the appeal was two days late. The Board's regulations, however, specifically provide that "[i]f the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date." 5

C.F.R. § 1201.23. The regulations governing IRA appeals, 5 C.F.R. Part 1209, specify that, unless expressly provided, the Board will apply certain subsections, including the subsection for computation of time,² of 5 C.F.R. Part 1201 to IRA appeals. 5 C.F.R. § 1209.3. There is no contradictory provision for calculating time limits in Part 1209.

Both the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Appellate Procedure (FRAP) provide that in computing any period of time prescribed or allowed by the FRCP and FRAP, by order of court, or by any applicable statute, the last day of the period shall be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next business day. FRCP 6(a); FRAP 26(a).

The Federal Circuit applies the FRAP and does not have any specific rule or case law of its own on this issue. Its predecessor court,³ however, held that filing on the 91st day was timely where the 90th day of a statutorily-imposed deadline fell on Sunday. See *Schultz v. United States*, 132 F. Supp. 953, 956-57 (Ct. Cl. 1955), citing *Union National Bank of Wichita, Kansas v. Lamb*, 337 U.S. 38, 40-41 (1949). The Supreme Court, in *Union National Bank*, found an appeal timely filed on the next business day where the last day of the statutory time period ended on the weekend. See also *Jones &*

² Subpart B of 5 C.F.R. Part 1201.

³ The Federal Circuit has adopted as binding precedent the case law of the Court of Claims.

Laughlin Steel Corporation v. Gridiron Steel Company, 382 U.S. 32 (1965).

With the exception of the Sixth Circuit, the courts of appeals⁴ have enlarged the jurisdictional time period where the last day of the statutorily-imposed time period falls on a weekend or holiday. The minority view of the Sixth Circuit that jurisdictional time limits may not be enlarged even when the last day falls on a weekend or a holiday relies on its view that FRCP 6(a) governs procedural matters only once the case properly was before the court.⁵ See *Hilliard v. United States Postal Service*, 814 F.2d 325, 327 (6th Cir. 1987).

ORDER

Accordingly, we find that the appeal was timely filed on Monday, October 12, 1992, and we REMAND this case to the San

⁴ *United Mine Workers of America v. Dole*, 870 F.2d 662, 664-65 (D.C. Cir. 1989); *Maahs v. United States*, 840 F.2d 863, 864-67 (11th Cir. 1988); *Arnold v. United States*, 816 F.2d 1306, 1310 (9th Cir. 1987); *Miller v. United States Postal Service*, 685 F.2d 148, 149 (5th Cir. 1982), cert. denied, 461 U.S. 916 (1983); *Kane v. Douglas*, 635 F.2d 141, 142 (2d Cir. 1980); *Pearson v. Furnco Construction Co.*, 563 F.2d 815, 818-19 (7th Cir. 1977); *Vigil v. United States*, 430 F.2d 1357 (10th Cir. 1970); *Wirtz v. Peninsula Shipbuilders Association*, 382 F.2d 237, 238-40 (4th Cir. 1967); *Winchell v. Lortscher*, 377 F.2d 247, 250 n.1 (8th Cir. 1967).

⁵ Also, only the Sixth Circuit has distinguished between procedural and jurisdictional time limits.

Francisco Regional Office for adjudication of the merits of the appellant's appeal.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board